New York New York Hotel, LLC, d/b/a New York New York Hotel and Casino *and* Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO. Case 28–CA–14519

July 25, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On June 29, 1998, Administrative Law Judge Timothy D. Nelson issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed limited exceptions and a supporting and answering brief, and the Respondent filed a reply and answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[2]

The Respondent owns and operates a hotel and casino facility in Las Vegas, Nevada. The Union represents a bargaining unit of certain of the Respondent's employees. Ark Las Vegas Restaurant Corporation (Ark) operates several restaurants and eateries within the casino. At the time of the events in this case, the Union was attempting to organize Ark's employees and to obtain recognition from Ark.

On July 9, 1997, three off-duty Ark employees went to the "porte-cochere" (the area just outside the main entrance to the casino), where they stood on the sidewalk and attempted to distribute handbills to customers as they entered the facility. The handbills bore an area standards message, stating that Ark paid its employees less than unionized workers and urging customers to tell Ark to sign a union contract. The handbills expressly disclaimed any dispute with the Respondent. Shortly after the handbillers appeared, they were informed by managers of the Respondent that they were trespassing on the Respondent's property and that they were not allowed to solicit or distribute handbills there. When the handbillers refused to leave, the Respondent called the police, who issued trespass citations to the handbillers and escorted them off the premises.

The judge found that the Respondent violated Section 8(a)(1) of the Act by prohibiting the handbilling. In reaching that conclusion, the judge found that, as employees of Ark, the handbillers enjoyed the right to use the nonwork areas of the Respondent's premises to distribute handbills to customers entering or leaving. We agree.[3] As the judge observed, the Board has held that employees of a subcontractor of a property owner who work regularly and exclusively on the owner's property are rightfully on that property pursuant to the employment relationship, even when off duty. *Gayfers Department Store*, 324 NLRB 1246, 1249–1250 (1997), citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Southern Services*, 300 NLRB 1154, 1155 (1990), enfd. 954 F.2d 700 (11th Cir. 1992). By contrast, individuals who do not work regularly and exclusively on the employer's property, such as nonemployee union organizers, may be treated as trespassers, and are entitled to access to the premises only if they have no reasonable nontrespassory means to communicate their message. *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).[4] A clear distinction exists between the Ark employees, who work regularly and exclusively in the Respondent's facility, and taxi and limousine drivers and other delivery personnel who visit that facility intermittently in the course of their employment. Contrary to the Respondent, nothing in this decision or in those on which it is based suggests that the Respondent would be required to allow such individuals to solicit or distribute handbills on its property.

Accordingly, such off-duty employees may engage in protected solicitation and distribution in nonwork areas

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] We shall amend the judge's recommended Order to include the payment of interest on legal expenses as part of the reimbursement remedy. See, e.g., *New Jersey Bell Telephone Co.*, 308 NLRB 277, 283 (1992). Interest shall be computed as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[3] We therefore need not address the General Counsel's exception to the judge's failure to find that the Respondent and Ark had a "symbiotic relationship" such that the Ark employees should be found to have the same access rights as the Respondent's employees.

[4] In Member Truesdale's view, the reasoning of *Lechmere* does not apply when nonemployee union representatives enter an employer's property to engage in Sec. 7 activities other than organization. See his dissenting opinions in *Loehmann's Plaza*, 316 NLRB 109 (1995), and *Leslie Homes,* 316 NLRB 123 (1995), affd. sub nom. *District Council of Carpenters v. NLRB,* 68 F.3d 71 (3d Cir. 1995). Accordingly, he would apply a balancing test rather than the strict inaccessibility test of *Lechmere* in cases involving Sec.7 activity other than organizational activity.

Member Liebman did not participate in *Leslie Homes* or *Loehmann's Plaza* and has not passed on the proper test to be applied in access cases involving nonorganizational Sec. 7 activity by nonemployees. She finds it unnecessary to do so in this case as it does not involve nonemployees, but rather off-duty employees of a subcontractor of the Respondent who work regularly and exclusively on the Respondent's property.

of the owner's property unless the owner can show that prohibiting that sort of activity is necessary to maintain production and discipline.[5]

The judge also found that the porte-cochere was a nonwork area, despite the fact that some of the Respondent's employees work there.[6] We agree with that finding for the reasons set forth in his decision. We note also that in *Santa Fe Hotel & Casino*, 331 NLRB 723 (2000), which issued after the judge rendered his decision, the Board came to the same conclusion. The Board found that the main function of the employer's hotel/casino was to lodge people and allow them to gamble, and that the work of bellmen, valet parking attendants and security, maintenance, and gardening personnel around entrances to the employer's facility was incidental to that function. Were it to hold such areas to be "work areas" from which off-duty employee handbillers could be excluded, the Board reasoned, employees would be effectively denied the right to distribute literature anywhere at the facility.[7] Accordingly, the Board held that those areas were not work areas. The same reasoning applies here.[8]

The Respondent contends that the judge erred in failing to find that its expulsion of the handbillers was justified in the interest of maintaining production and discipline. In this regard, the Respondent argues that the ban was necessary to ensure proper service to its guests and for the safety and security of its guests, employees, and property. We find no merit in this exception. As the judge found, the handbilling did not adversely affect either the customers' ability to enter or leave the facility or the Respondent's employees' ability to perform their customary work in the porte-cochere area. He also found, and we agree, that the handbilling of customers has no inherent tendency to interfere significantly with any of those activities. We therefore find that the Respondent has not shown that its ban on handbilling is necessary to maintain production and discipline.

The Respondent also contends that the judge improperly precluded it from asserting certain affirmative defenses and from introducing evidence in support of those defenses. We find no merit in that contention. The judge held an extensive colloquy with the Respondent's counsel, in which counsel explained in detail the theories behind the Respondent's affirmative defenses and the evidence he would offer in support of those defenses. He also made a detailed offer of proof, including exhibits, which the judge rejected.[9] Thus, the judge did not prevent the Respondent from asserting its affirmative defenses. He simply rejected the proffered evidence on the ground that it lacked even a "remote chance" of making the Respondent's case.[10] As we explain below, we agree with his assessment.

At the hearing, the Respondent's counsel contended that the July 9 handbilling was unprotected because it was in aid of unlawful union activities. Specifically, he argued that the Union had engaged in picketing and other conduct with an object of forcing the Respondent to cease doing business with Ark and other subcontractors, in violation of Section 8(b)(4)(B). He also contended that the Union's economic pressure violated Section 8(b)(3) because it was intended to, in effect, force the Respondent to agree to a mid-term modification of its

[5] We reject the Respondent's contention that *Gayfers* and *Southern Services* are inconsistent with *Scott Hudgens*, 230 NLRB 414 (1977). There, warehouse employees of a shoe store picketed one of the stores on the property of a shopping mall. Although the Board analyzed the pickets' right of access to the mall property under *Babcock & Wilcox* rather than under *Republic Aviation*, the pickets—unlike the handbillers here—did not regularly work at the mall and thus were not rightfully on the mall property pursuant to their employment relationship.

Contrary to the Respondent, it is irrelevant that the employee in *Southern Services* (unlike the handbillers here) was distributing handbills to other employees, rather than to customers, and was doing so on her way into the facility to sign in for work, rather than on a day when she was not scheduled to work. See, e.g., *Gayfers* (off-duty employees of electrical contractor distributed area standards handbills to customers of store in which employees were working); *Nashville Plastic Products*, 313 NLRB 462, 463 (1993) (off-duty employees seeking access to their employer's property for organizational purposes on days when they are not scheduled to work, treated as employees and not as trespassers).

[6] The record establishes that doormen, baggage handlers, and valet parking attendants work continuously in the porte-cochere area, and that other employees (e.g., bellmen, maintenance and security personnel) also work there regularly but not continuously.

In the last sentence of the fourth paragraph of his decision, the judge inadvertently stated that the Respondent contended that the porte-cochere was a nonwork area and that the General Counsel argued that it was not; in fact, as the rest of the judge's decision makes clear, it was the General Counsel who argued that the porte-cochere was a nonwork area and the Respondent who urged that it was a work area.

[7] See *U.S. Steel Corp.*, 223 NLRB 1246, 1247–1248 (1976).

[8] The Respondent notes that the Board in other cases involving employee solicitation and distribution in casinos has applied the analysis originally devised for such activities in retail stores. See, e.g., *Dunes Hotel*, 284 NLRB 871, 876–878 (1987), citing *Marshall Field & Co.*, 98 NLRB 88 (1952), modified 200 F.2d 375 (7th Cir. 1953). The Respondent contends that the porte-cochere should be considered akin to aisles and corridors in retail stores, in which the Board in *Marshall Field* held employee solicitation could be lawfully prohibited in the interest of avoiding traffic and safety hazards. 98 NLRB at 92. We find no merit in that contention. There is no evidence that the handbilling in this case (which took place on an 18-foot wide sidewalk) posed or could have posed a traffic or safety hazard. And, as the judge found, the handbillers did not interfere with customers entering or leaving the casino, or with the Respondent's employees performing their job duties.

[9] After the hearing closed, the Respondent requested the judge to reopen the record and receive the excluded evidence. The judge denied the request for the reasons he stated at the hearing.

[10] Contrary to the Respondent's suggestion, there is no reason why its offer of proof should be found an insufficient basis for deciding the merits of its defenses. See, e.g., *Del Rey Tortilleria*, 272 NLRB 1106, 1107–1108 (1984), enfd. 823 F.2d 1135 (7th Cir. 1987).

collective-bargaining agreement with the Union, which allowed the Respondent to subcontract food service functions under certain conditions.[11] In support of those contentions, counsel offered to show, inter alia, that the Union had engaged in demonstrations and mass picketing, at which some of the pickets and demonstrators wore t-shirts and buttons with antisubcontracting messages. One episode of mass picketing was taking place at the same time the handbillers were in the porte-cochere on July 9. Counsel also offered to show that union representatives had made antisubcontracting comments and that the Union had not petitioned for an election after Ark refused its request for recognition.

As the party asserting that the handbillers' actions were unprotected because they had an unlawful objective, the Respondent has the burden to demonstrate the unlawful nature of their conduct.[12] Having reviewed the evidence proffered by the Respondent in support of its affirmative defenses, we agree with the judge that that evidence failed to establish that the Union was engaged in an unlawful course of conduct and that, even if it was, the evidence did not establish that the handbillers were acting in support of that conduct.

To begin with, the off-duty employees were engaged in distributing handbills that bore an area standards message and urged customers to tell Ark to sign a union contract.[13] The handbills contained no evidence of a secondary or otherwise unlawful object; indeed, they specifically stated that the Union had no dispute with the Respondent. There is no contention and no evidence that the handbillers indicated in any way that their message was anything other than what it purported to be: a message to the public that Ark paid its employees less than unionized workers and an attempt to persuade Ark to sign a contract with the Union. The handbillers' conduct on July 9 therefore was facially protected by Section 7.

Contrary to our concurring colleague, we also find that the evidence offered by the Respondent does not establish that an object of the Union's picketing and other non-handbilling activity was to force the Respondent to cease doing business with Ark or any other subcontractor, or to submit to contract modifications that would eliminate or curtail subcontracting. There is no evidence that the Union made any such demands on the Respondent. There is no evidence, and no contention, that the picket signs used by the union demonstrators bore any such message; indeed, the Respondent's counsel conceded that the signs did not say "no subcontracting." Uncontroverted testimony indicates that the messages on the picket signs were the same as those on the handbills. Although some of the pickets wore t-shirts and pins with "no subcontracting" messages, such messages are ambiguous. They would not be inconsistent with a Union demand (had such been made) for the Respondent or other employers to cease doing business with Ark or other subcontractors, or to submit to midterm modifications of the collective-bargaining agreement. However, and especially absent such a Union demand, they are at least as susceptible of being interpreted as voicing simple opposition to subcontracting, or to further subcontracting. The statements by union representatives quoted in newspaper articles proffered by the Respondent indicate that the Union disapproves of subcontracting, but otherwise establish only that the Union was attempting to organize Ark. A videotape of a mass demonstration on May 30 adds nothing to the Respondent's defenses. We therefore find that the evidence fails to support the Respondent's 8(b)(4) and 8(b)(3) contentions concerning the Union's nonhandbilling activities.

But even if it were possible to construe the Union's picketing and other nonhandbilling activity as having an unlawful objective, we still would find no basis for concluding that the July 9 handbilling also had such an objective. There is no contention, and no evidence, that the handbillers wore "no subcontracting" T-shirts or pins, or that their message was anything other than organizational. Although picketing took place while the handbilling was in progress, this was a considerable distance away from the porte-cochere and the Respondent offered no specific evidence as to the pickets' attire or statements made in connection with the picketing.[14] There is good reason to doubt that the Union really was attempting (in part through the July 9 handbilling) to cause the Respondent to abrogate its contract with Ark or to cease doing business with Ark: had the Union succeeded, the Ark employees who engaged in the handbilling would have put themselves out of work. In the absence of any other information tending to establish such an unlikely objective on the part of the handbillers, we are unwilling to infer one.

We therefore find, for all the foregoing reasons, that the evidence offered by the Respondent was insufficient

[11] The Respondent filed charges alleging both of those theories, but the charges were dismissed by the Regional Director and the dismissals were upheld on appeal. At the outset of the hearing, the judge ruled that the Respondent was not foreclosed from asserting its defenses by the fact that the charges had been dismissed. See *Chicago Tribune Co*., 304 NLRB 259 (1991).

[12] Cf. *Electrical Workers Local* 501 *v. NLRB*, 756 F.2d 888, 898 fn. 8 (D.C. Cir. 1985) (in 8(b)(4)(B) case, General Counsel has burden of proving secondary boycott violation).

[13] Id. at 894; *Gayfers Department Store*, 324 NLRB at 1250.

[14] One of the handbillers testified that the picket signs bore the same area-standards message as the handbills.

to establish its defenses and was properly excluded by the judge.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, New York New York Hotel, LLC, d/b/a New York New York Hotel and Casino, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

"(c) Reimburse these employees, with interest, for any legal or other expenses which any of them may have incurred while defending themselves against the trespass citations prior to the point when the Respondent shall have notified the Las Vegas city attorney of its desire to withdraw the citations."

2. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN HURTGEN, concurring.

The principal issue in this case is whether off-duty employees of Ark Las Vegas Restaurant Corporation had a protected right to engage in area standards handbilling on the property of the Respondent, New York New York Hotel and Casino. I agree with my colleagues that the employees were entitled to distribute handbills in the porte-cochere area in front of the hotel.[1] Like my colleagues, I reject the Respondent's contention that the handbilling was unlawful under Section 8(b)(4)(B) and was therefore unprotected. I reach that conclusion, however, for somewhat different reasons.

The handbilling occurred concurrently with picketing. Contrary to my colleagues, I conclude that the picketing may well have been unlawful. An object thereof may well have been to require that New York New York cease doing business with Ark. Some pickets wore t-shirts and pins which bore the legend "no subcontracting." Inasmuch as New York New York contracted out the restaurant functions to Ark, it is reasonable to infer that the legend referred to this relationship. Thus, it would appear that *an* object of the picketing was to pressure New York New York to cease doing business with Ark. However, even if the picketing had this objective, that would condemn *the picketing* under Section 8(b)(4)(B), but would not condemn the handbilling. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568 (1988). I agree that the picketing and the handbilling were separate, so that any illegality of the picketing would not taint the handbilling.

[1] For reasons set forth in my separate opinion in *New York New York Hotel & Casino*, 334 NLRB No. 89 (2001), I agree with my colleagues that the Respondent unlawfully prohibited the handbilling in front of the porte-cochere and find it unnecessary to rely on *Southern Service*, 300 NLRB 1154 (1990), enfd. 954 F.2d 700 (11th Cir. 1992), or *Gayfers Department Store*, 324 NLRB 1246 (1997), in reaching that result.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United State Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT prohibit employees who work within our hotel/casino complex, including those employed by Ark Las Vegas Restaurants, Inc., from distributing union handbills to customers on the sidewalk in front of the porte-cochere entry doors.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you in Section 7 of the Act.

WE WILL remove from our files and records, including security incident reports, any reference to the fact that three employees of Ark Las Vegas Restaurants, Inc., conducted handbilling on July 9, 1997, at the porte-cochere entrance, and/or that we invoked Nevada trespass law against these employees, and WE WILL notify each employee, in writing, that this has been done and that we will not use either fact against them in the future.

WE WILL inform the Las Vegas city attorney in writing that we want to withdraw the trespass citations we caused to be issued against these employees on July 9, 1997.

WE WILL reimburse these employees, with interest, for any legal or other expenses which any of them may have incurred while defending themselves against the trespass

citations prior to the point when we notify the Las Vegas city attorney that we want to withdraw the citations.

NEW YORK NEW YORK HOTEL, LLC, D/B/A NEW YORK NEW YORK HOTEL AND CASINO

Scott B. Feldman, Esq., for the General Counsel.
Gary C. Moss and *Celeste M. Wasielewski, Esqs. (Pantaleo, Lipkin & Moss, P.C.),* of Las Vegas, Nevada, for the Respondent.
Kevin Kline, Representative, of Las Vegas, Nevada, for the Charging Party.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. On July 9, 1997,[1] agents of the Respondent[2] prohibited three off-duty employees of Ark Las Vegas Restaurant Corporation (Ark), which operates restaurants within the Respondent's hotel/casino complex, from distributing union handbills to the Respondent's customers on the private sidewalk in front of its main entrance, the "porte-cochere," located on the Respondent's private property. This triggered an unfair labor practice prosecution brought in the name of the General Counsel of the National Labor Relations Board alleging that when the Respondent prohibited the handbilling, it violated Section 8(a)(1) of the National Labor Relations Act. I heard the case in trial in Las Vegas, Nevada, on February 11, 1998, following which counsel for the General Counsel and counsel for the Respondent submitted helpful posttrial briefs, which I have studied.[3]

The procedural background helps to isolate what is and is not in issue in the case: On July 11, the Union[4] filed an initial charge against the Respondent and Ark as "joint employers," alleging that they, through a common agent, committed a variety of 8(a)(1) violations in response to the July 9 handbilling, including by "prohibiting" the handbilling. The Union first amended this charge on August 29, notably by deleting the claim that the Respondent and Ark are joint employers and by now naming only the Respondent as the charged party. On September 8, the Union further trimmed the outstanding charge by alleging simply that the Respondent had unlawfully prohibited the July 9 handbilling. On September 10, embracing the charge as ultimately amended, the Regional Director for Region 28 issued an amended complaint alleging that the Respondent violated Section 8(a)(1) when its agents "denied employees access to its property to distribute union literature." Moreover, implicitly acknowledging that the "employees" in question were not employed by the Respondent, but by Ark, a separate paragraph in the complaint seems to suggest that, due to a supposed "symbiotic relationship" between the Respondent and Ark, the three handbillers were *tantamount* to employees of the Respondent, i.e., they were "invest[ed] with essentially the same rights and privileges as employees of the Respondent in the particular circumstances of the instant case."[5]

By its answer and otherwise, the Respondent has admitted that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act,[6] that the Union is a labor organization within the meaning of Section 2(5) of the Act, and that it prohibited the July 9 handbilling on its premises. However, the Respondent denied any "symbiotic relationship" with Ark, and further denied that Ark's employees are "invested with essentially the same rights and privileges" its own employees may enjoy. The Respondent also averred two affirmative defenses in its answer: (1) The July 9 handbillers "did not and do not have any type of employment relationship with Respondent, and . . . had no right of access to Respondent's private property to distribute literature[.]" (2) The handbillers "had reasonable alternative means of . . . communicating with . . . customers and guests of Respondent[.]"

As is implicit in these pleadings, the parties disagree centrally about whether the off-duty Ark employees enjoyed a presumptive statutory right of access to the Respondent's property for purposes of distributing the handbills in question,

[1] All dates below are in 1997, unless I say otherwise.

[2] The Respondent is the limited liability company, New York New York Hotel, LLC, that owns and operates the New York New York Hotel and Casino in Las Vegas, Nevada.

[3] I grant the Respondent's unopposed motion to correct the trial transcript, filed separately from its brief, which I receive into evidence as ALJ Exh. 1. I deny the Respondent's separate motion (received as ALJ Exh. 2) to strike a portion of the General Counsel's brief making a factual claim said by the Respondent to be grounded in a misinterpretation of the record. (However, I find that the record does not preponderantly support the General Counsel's claim of fact, and, in any case, the claimed fact, even if true, would not materially affect my analysis.) Finally, the Respondent requests on brief (pp. 38–39), that I order a reopening of the record to permit the Respondent to introduce evidence that I barred during the trial. This was evidence proffered in support of a defense, raised for the first time during the trial, that the handbillers' activities were unprotected because they were allegedly part and parcel of a surrounding campaign by the Union which, although nominally aimed at organizing Ark's employees, independently violated either Sec. 8(b)(4) or Sec. 8(b)(3), or both sections. I deny the Respondent's request to reopen for substantially the same reasons I stated after hearing the Respondent's offer-of-proof during the trial. And see Rule 403, Fed.R.Evid.

[4] As depicted in the undisputed pleadings, the Union is a joint entity, Local Joint Executive Board of Las Vegas, apparently participated in by two local unions, Culinary Workers Union, Local 226, and Bartenders Union, Local 165, each affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO.

[5] The paragraph in question (par. 2(e)) reads in full as follows:

> At all material times, Respondent and ARK Las Vegas Restaurant Corporation have shared common premises and facilities, have provided services for each other, have held themselves out to the public as a single-integrated business enterprise, and otherwise enjoyed a symbiotic relationship with one another, thereby investing the employees of Ark Las Vegas Restaurant Corporation with essentially the same rights and privileges as employees of the Respondent in the particular circumstances of the instant case.

[6] Relatedly, the pleadings establish, and I find, that New York New York Hotel and Casino received gross revenues exceeding $500,000 in the first 6 months of its operations (starting on or about January 3, 1997), that this was a representative period, and that in the same period it purchased and received more than $50,000-worth of goods and materials directly from points outside Nevada.

which related to the Union's campaign to organize Ark's employees. The General Counsel contends that the Ark employees enjoyed the same presumptive rights of access to nonwork areas of their worksite during nonwork times that the Supreme Court declared in *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945), were available to employees of the owner of the worksite. The Respondent, invoking *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956), and *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992), argues that the handbillers, being "nonemployees" of the Respondent, enjoyed no presumptive "rights" of access whatsoever for purposes of distributing the union handbills. However, a further question divides the parties even if it were found that the *Republic Aviation* rule properly applies to the handbillers' activities: Is the porte-cochere a "nonwork" area? The Respondent says it is; the General Counsel says it isn't.

Based on the further findings and the reasoning set forth below, I judge that *Republic Aviation* declares the rule applicable to the handbillers' activities, and that the porte-cochere is, for these purposes at least, a nonwork area—more precisely a "nonselling area open to guests and the public." Accordingly, I find ultimately that the Respondent's prohibition of the handbilling violated Section 8(a)(1). In arriving at that result, however, I will find it unnecessary to visit the question whether the Respondent and Ark "enjoyed a symbiotic relationship with one another"; much less will I decide whether such a business symbiosis, if it existed, would require a finding that the employees of Ark have been "invest[ed] . . . with essentially the same rights and privileges as employees of the Respondent."

I. FINDINGS[7]

A. The General Setting

The New York New York Hotel and Casino (NY-NY) is a recent addition to the Las Vegas Strip, having opened in January 1997. NY-NY is a "theme" complex built on the desert floor to resemble, from some perspectives, the lower Manhattan skyline—from the Chrysler Building to the Statue of Liberty, but with a roller coaster imported from Coney Island weaving through this architectural array. Inside the complex, according to the Respondent's advertisements, "this themed hotel and full-service casino re-creates the ambiance and excitement of the Big Apple. . . bring[ing] to life the charm of Greenwich Village and the excitement of a bustling Times Square[,]" and "puts gamers right in the middle of all the action." Indeed, even "the carpet paths in the casino carries [sic] the design of an authentic New York street, complete with curbs and crosswalks that guide the visitor to the . . . gaming areas."

NY-NY sits at one corner of the intersection of two main public thoroughfares, Las Vegas Boulevard (the Strip) and Tropicana Avenue. Its main or "front" entrance, which the Respondent prefers to call the "porte-cochere," features a wide bank of automatic swinging glass doors (9 sets of doors in all) each framed in polished brass, through which customers enter immediately into the casino. The entry doors face out to the Strip, but are set back at least 100 feet from it, separated first by a public sidewalk adjoining the Strip, next by hedgerows marking the perimeter of the private property, next by six private traffic lanes, and next by an 18-foot-wide private sidewalk immediately in front of the entry doors. Customers in cars, taxis, and shuttle vans must follow a privately maintained roadway from a public street exit to arrive at the porte-cochere, where passengers and their luggage are discharged and collected, and where valet parking services are available. Pedestrian customers may likewise arrive at the porte-cochere by following private sidewalks from the public sidewalks adjoining the main thoroughfares.

The porte-cochere "area" referred to below is defined primarily by the impressive canopy that covers the main entry. The canopy, a large rectangular form with a smaller rectangular tab protruding from it, extends about 100 feet from the building at its outermost edge, and spans a roughly equal width, covering a total area of about 10,000 square feet. It shelters not only the private sidewalk in front of the main entry doors, but also the six private traffic lanes adjacent to the sidewalk. The three lanes farthest from the entry doors are reserved for temporary parking by customers who use the valet parking service; the three lanes closest to the entry are for vehicles that stop briefly to discharge or pick up passengers; two are for taxis and shuttle vans and one is for private cars.

NY-NY employs car valets, baggage-handlers, and uniformed doormen/cab-hailers (two doormen per shift), all of whom who spend substantially all of their worktime in the porte-cochere area. Some other NY-NY employees, such as maintenance workers and security personnel, work or appear at regular intervals in the porte-cochere area as part of their roving duties. Still other NY-NY employees, too varied in classification to capture briefly, may find ad hoc business reasons to visit or perform tasks in the porte-cochere area.

In keeping with its overall promise of big-city fun and excitement, NY-NY advertises that it "serves up tempting cuisine . . . with an array of restaurants . . . [e]ach . . . [p]roviding [a] variety of different fares[.]" In fact, the Respondent does not own or operate these restaurants; rather, it leases space to independent restaurant management businesses such as Ark, which itself operates at least two main restaurants in the complex "America" and "Gallaghers," plus six or seven small, fast food outlets arranged together in an area called "Village Streets," a food court setting apparently designed to evoke the experience of dining in Greenwich Village. Ark also is responsible for preparing and furnishing room-service meals to the Respondent's hotel guests.

All employees working within Ark's restaurants are employed exclusively by Ark, but according to the terms of Ark's employee handbook they are also subject to NY-NY's own "policies" respecting such things as "[e]mployee entrances, parking, drug testing, name tags [and] conduct at the hotel while off and on duty." NY-NY permits, even encourages, off-duty, employees of Ark to visit and patronize the casino and the restaurants in the complex and to use routes open to the public, including through the porte-cochere, to enter or exit from the complex. Indeed, it appears that NY-NY (and Ark, in turn) imposes only two restrictions on the visitation rights of off-duty

[7] Unless I note otherwise, all findings are based on credible and undisputed testimony or documents of record, which include videotapes of the porte-cochere area described below.

Ark workers—that they not wear their work uniforms, and that they not patronize the bars.[8]

Shortly before opening NY-NY in January 1997, the Respondent recognized the Union as the exclusive collective-bargaining representative of any of its employees working in certain "culinary classifications," and it later entered into a labor agreement with the Union purporting to cover those classifications—an agreement which, by its terms, was due to run for only two months (from April 1 through May 31, 1997), but which the parties were apparently still treating as "in effect" when this case was tried in February 1998.[9] However, inspection of the union contract suggests that the recognition—indeed, the contract itself—may have been essentially prospective and conditional in nature. This is because, so far as this record shows, NY-NY did not employ any culinary employees when the union contract was signed, nor at the time of the July 9 handbilling. Rather, as the union contract itself acknowledges, only "lessees" of NY-NY (such as Ark) and their own employees were currently involved in any food service operations, and "[c]onsequently, the contract relating to food service functions is not applicable[,]" but would be subject to "activat[ion]" in the "future" event that NY-NY might itself engage in "food service operations."[10]

It is clear in any case that the union contract was not intended to cover Ark's employees, who have been unrepresented at all material times. Indeed, the record shows that at the time of the July 9 handbilling, described next, the Union was trying to organize Ark's employees and to obtain recognition from Ark as their exclusive representative.

B. The July 9 Handbilling; the Respondent's Reaction

Sometime in the late morning of July 9, three off-duty employees of Ark—Edward Ramis, John Ensign, and Ron Isomura—appeared in the porte-cochere area and positioned themselves about 10 feet apart on the 18-foot-wide sidewalk separating the private traffic lanes from the doorways into the casino. There, they passed out identical handbills to customers as they walked across the sidewalk to the entry doors. The handbills, authored by the Union, protested as "Unfair" that "Ark Restaurants at the New York-New York have no contracts with the Culinary & Bartenders Unions." The handbills contained a lengthy chart purporting to "illustrate the difference between the wages and benefits of Ark workers versus those of Unionized workers up and down the Las Vegas Strip." The handbills also contained a request—that the customer-recipients "[t]ell Ark's managers at America, Village Streets (food court), Gonzales y Gonzales, and Gallaghers that Ark should recognize and negotiate a fair contract with its workers." They further advised as follows:

> We are not asking the employees of any employer to stop their work. We have no dispute with the New York-New York Hotel & Casino, only Ark Restaurants Corporation, which runs some of the food and beverage operations inside the New York-New York.

Each of the three employee-handbillers was dressed in street clothes, not Ark work uniforms, and each wore a union button on his shirt identifying him as a "Committee Leader, Union Local 226." In some cases, customers taking the handbills would pause to ask questions, and the handbillers would reply; however, the frequency of such exchanges is uncertain on this record, and, crediting Ramis, no such exchange lasted more than 2 minutes. The record otherwise shows—and the Respondent's agents concede—that the handbilling activities did not impede customer entry or egress, and caused no disruption to the work being performed by the car valets, baggagehandlers, and doormen who were then working in and around the porte-cochere area.

Shortly before noon, apparently not long after the handbilling began, Karen Lightell, a security supervisor for the Respondent, approached the handbillers and was soon joined by Dennis Shipley, the Respondent's vice president of human resources. In the ensuing conversations, Lightell told the handbillers that they were trespassing on the Respondent's private property and weren't allowed to solicit or distribute literature there.[11] At some point, the handbillers produced and displayed their Ark employee identification cards to Lightell and/or Shipley. Eventually, when the handbillers refused to leave voluntarily, Lightell read to them from a copy of the Nevada Trespass Statute (apparently a formality required before the police could be called to evict and cite the claimed trespassers under the trespass statute), and when they still refused to leave, Shipley authorized another security agent to call-in the "Metro" police. At about noon, the Metro police arrived, escorted the three handbillers from the premises, and issued each of them written citations for trespass, noting on the citations that they had "remain[ed] on the property after warning not to trespass by a representative of the owner, to wit, Karen Lightell[.]"

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[8] For findings in this paragraph I rely in part on the testimony of Dennis Shipley, the Respondent's vice president for human resources, and in part on Ark's employee handbook. The handbook states pertinently that it is the "explicit policy of New York-New York" that "[a]ll Ark Las Vegas employees are welcome to use the gambling facilities, when off duty[,]" but that "[t]he only restriction is that you must not be in a Company uniform of any kind[,]" and that, "[a]ll bars, unfortunately, are off limits to all employees at all times."

[9] Testimony of the Union's staff director, Donald Taylor.

[10] To elaborate, the recognition clause of the union contract purports to grant recognition to the Union as the exclusive representative of the employees of the Respondent "working in those job classifications listed in Exhibit 1[.]" The "Exhibit 1" incorporated into the contract (appearing at pp. 37a–b) lists over 40 separate job classifications—described in the heading to the exhibit as "culinary classifications." However, according to " Side Letter # 5" (p. 43) of the contract,

> The Union understands and agrees that the Employer has leased its entire food operations to third parties ("Lessees"). Consequently the food classifications in Appendix A [sic] and the contract relating to food service functions is [sic] not applicable. If, in the future, the Employer engages in food service operations other than those described in the paragraph below, food-related classifications and language will be activated.

[11] On demeanoral grounds, and in the light of surrounding circumstances unnecessary to detail, I discredit Ramis insofar as he claims that either Lightell or Shipley told him that he could be fired for his handbilling activity.

II. ANALYSES, SUPPLEMENTAL FINDINGS, AND CONCLUSIONS

A. General Principles

Under established interpretations of Section 7's "mutual aid or protection" clause, employees have a presumptive statutory right (i.e., a right that exists absent "special circumstances") to use their workplace as a forum for circulating petitions or distributing literature, so long as they do it in nonwork areas and during nonwork times (*Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945)), and so long as the subject of their activity can fairly be said to "bear a relationship to their interests as employees." *Eastex, Inc. v. NLRB,* 437 U.S. 556, 567 (1978). By contrast, "nonemployee union representatives" seeking to advance the interests of employees enjoy no right grounded in the Act to enter or use an employer's property for such purposes, except in relatively rare cases where it can be demonstrated that there exist no adequate, alternative ways for the union to communicate with its target audience. *NLRB v. Babcock & Wilcox Co.* 351 U.S. 105 (1956); *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992).

We are instructed by *Hudgens v. NLRB,* 424 U.S. 507, at 521–522 (1976), that there is a "reason . . . of substance" for treating employees differently from nonemployee union representatives for these purposes, namely, that "employees [are] already rightfully on the employer's property," and therefore, only the "employer's management interests rather than his property interests [are] involved," whereas nonemployees have no such preexisting status as "invitees," and, therefore, the employer's property interests are most directly implicated when a nonemployee union representative seeks access to the property. Id. at 521–522. Accordingly, an employer who maintains and enforces in a nondiscriminatory way a nondiscriminatory policy banning "outsiders" from access will not normally commit a 8(a)(1) violation when it enforces that policy as to nonemployee union agents, no matter what their particular purpose may be for seeking access. Ibid.

B. Which Standard Applies?

The *purpose* of the handbilling activity conducted by the three Ark employees—to protest Ark's failure to recognize and negotiate with the Union as their representative, and to enlist customer support to help secure recognition and a union contract from Ark—clearly bore a direct and intimate "relationship to their interests as employees," and thus clearly qualified as protected activity under the liberal standard expressed in *Eastex,* supra. However, as previously noted, the parties' dispute is grounded in large part on a disagreement about the handbillers' rights to use NY-NY property as a site for conducting their otherwise protected activity. The Respondent, relying exclusively on the fact that Ark employees have no "employment relationship with NYNY," argues that this case is governed by *Babcock & Wilcox* principles. To the contrary, the General Counsel argues, in substance, that the fact that the employee-handbillers were not employed by the Respondent does not defeat the applicability of the *Republic Aviation* rule to their activity, because here the handbillers were not "strangers" to the property, but were employed "regularly and exclusively" on the property, and were thus "invitees" to the property.

The General Counsel's argument is well supported by at least one recent Board decision affirming that employees of a subcontractor of a property owner who work regularly or exclusively on the owner's premises enjoy rights under *Republic Aviation* to use the nonwork areas of the premises to distribute union literature to customers entering or leaving the premises. See *Gayfers Dept. Store,* 324 NLRB 1246 (1997). The General Counsel's argument draws further nourishment from the case on which *Gayfers* principally relies, *Southern Services,* 300 NLRB 1154 (1990), enfd. 954 F2d 700 (11th Cir. 1992) (Coca Cola Company violated Sec. 8(a)(1) by prohibiting employee of janitorial subcontractor from distributing union organizing literature to fellow janitors employed on Coca Cola's premises).

The Respondent argues that the cited cases are distinguishable on their facts from this one. I find that the factual differences cited by the Respondent are too marginal and inconsequential to justify a different legal analysis herein. The Respondent further argues in any case that "the Board's legal analysis in *Gayfers,* like *Southern Services,* is fatally flawed," because it relied on "extremely attenuated reasoning" to justify application of the *Republic Aviation* rule to cases involving the access rights of employees to premises where they work but which are owned by someone other than their own employer. Such arguments are better directed elsewhere. I must follow the Board's precedents unless they are reversed by the Supreme Court. *Waco, Inc.,* 273 NLRB 746, 749 fn. 14 (1984); see also *Iowa Beef Packers,* 144 NLRB 615, 616 (1963).

Accordingly, relying on *Gayfers* and *Southern Services,* I find that the *Babcock & Wilcox/Lechmere* rule applicable to "nonemployee union representatives" does not govern the analysis herein; rather, I find, the employees of Ark enjoyed *Republic Aviation* rights of access to the Respondent's nonwork areas to conduct the handbilling in question.[12] Thus, it remains only to determine whether the *area* they selected to conduct their handbilling, the porte-cochere, is properly regarded as a "nonwork" area.

C. Is the Porte-Cochere a Nonwork Area?

The Respondent's claim that the porte-cochere area is a "work area" stresses that the area is the regular daily worksite

[12] Moreover, it does not matter to an analysis of their statutory access rights that the employee-handbillers were "off-duty" when they conducted their handbilling. That an employer may not ban off-duty employees from using nonwork areas to conduct protected solicitations or distributions is explicit in several Board decisions involving hotel/casino operations. See *Dunes Hotel & Country Club*, 284 NLRB 871, 877–878 (1987); *Harvey's Wagon Wheel,* 271 NLRB 306, 316 (1984); *John Ascuaga's Nugget,* 230 NLRB 275 (1977). (For cases applying the same reasoning in nonretail operations, see, e.g., *Nashville Plastic Products,* 313 NLRB 462, 463 (1993), and *Southern California Gas Co.,* 321 NLRB 551, 557 (1996).) Indeed, the fact that the employees herein conducted their handbilling at times when they were not scheduled to work at the premises is an especially trivial consideration in determining their Sec. 7 rights of access where NY-NY has clearly invited them to visit and patronize the casino and most of its facilities during their off-duty hours.

for car valets, doormen, and baggage-handlers employed by NY-NY, and the occasional situs for work done by NY-NY's roving maintenance and cleaning crews and a variety of other NY-NY employees who may have ad hoc reasons to go into the area. The General Counsel, relying on authorities discussed below, urges that these facts don't matter to the analysis. Rather, according to the General Counsel, what counts ultimately is that the porte-cochere area is a "public" area, and that it is physically and functionally distinct from the "selling floor" of the particular kind of "retail" business that we confront in this case, i.e., the casino floor itself. Again, I find that the General Counsel's arguments are well supported by the caselaw, and that the Respondent's contentions don't fit at all well within that body of law.

As all parties recognize, the Board has held that "gambling establishments" (no matter that they may include associated amenities such as hotels, restaurants and bars, or entertainments such as lounge acts, stage shows, or even roller coasters) "are analogous to a retail store for the purpose of considering the lawfulness of no-solicitation and no-distribution rules." *Dunes Hotel & Country Club* (supra at fn. 11), 284 NLRB at 876–878, citing *Barney's Club,* 227 NLRB 414 (1976). Thus, in *Dunes Hotel,* the Board found, applying the "selling/nonselling area" distinctions set forth in its "seminal" decision in *Marshall Field & Co.,* 98 NLRB 88, 92 (1952), and its later decision in *McBride's of Naylor Road,* 229 NLRB 795 (1977), that the casino-employer's ban on employee solicitation and distribution "in work areas or areas open to guests" was unlawfully broad insofar as it purported to bar such activity in "nonselling areas open to the guests or the public." 284 NLRB at 878.

It appears that the Board has not yet addressed the precise question whether the area outside the front entrance to a casino, such as the porte-cochere area herein, should be regarded as a "nonselling area open to the guests or the public" within the meaning of the *Dunes Hotel* holding, and thus a protected zone for employee solicitations and distributions. However, on the face of things, such an area would clearly seem to fall within the quoted category, despite the fact that the area may also be a work situs for some of the Respondent's employees.[13] Thus, the fact that some employees perform work in the porte-cochere area would appear to be legally subordinate to the controlling fact that the area is nevertheless a "nonselling area open to the guests or the public."[14] In addition, I note that the handbilling on July 9 had no adverse impact on either the customers' entry or egress or on the ability of the Respondent's employees to perform their customary work there. Finally, contrary to the Respondent's arguments, I find that handbilling of *customers* in the porte-cochere area has no inherent tendency to interfere significantly with either the customers' ingress or egress or with the ability of car valets, doormen, baggage-handlers, or any other employees who may perform work in the area. Accordingly, the Respondent has failed to demonstrate that its legitimate "management interests" (as *Hudgens v. NLRB,* supra, used that expression, distinguishing it from "property interests") would be impaired in any significant way by permitting employee-handbilling directed to customers in the porte-cochere area.

In sum, consistent with the thrust of the complaint, and rejecting all arguments of the Respondent to the contrary, I conclude as a matter of law that when the Respondent prohibited the employees of Ark from distributing union handbills to customers in the porte-cochere area, the Respondent unlawfully interfered with, restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby violated Section 8(a)(1). On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[15]

ORDER

The Respondent, New York New York, LLC, d/b/a New York New York Hotel and Casino, operating in Las Vegas, Nevada—including its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees who work within the Respondent's hotel/casino complex, including those employed by Ark Las Vegas Restaurants, Inc., from distributing union handbills to customers on the sidewalk in front of the porte-cochere entry doors.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Within 14 days from the date of this Order unless otherwise specified below, take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remove from its own files and records, including security incident reports, any reference to the fact that the employee-handbillers herein, Edward Ramis, John Ensign, and

[13] Although the Board has not itself addressed the precise question, I note that two different administrative law judges have used reasoning in cases now pending before the Board on exceptions that is essentially similar to that I have just applied to reach the same conclusion I have just reached—that the area outside the entrance to a casino is a "nonselling area open to the guests or the public," and that employees' statutory rights were violated when the casino-employers, invoking no-solicitation/distribution rules, took various steps to prevent them from distributing union handbills to customers outside these entrances—and this despite the fact that in each of those cases, as herein, those areas were likewise work sites for car valets, doormen and others employed by the casino employers. See *Reno Hilton,* JD (SF) 09-98 (Administrative Law Judge Jay R. Pollack), and *Santa Fe Hotel & Casino,* JD (SF)-64-96 (Administrative Law Judge Burton Litvack).

[14] Indeed, in *United States Steel Corp.,* 223 NLRB 1246, 1247 (1976), the Board took a skeptical view of the nonretail employer's ban on employee solicitations or distributions in purported "work areas" that included *any* areas where "work" may be performed. Thus, the Board adopted the administrative law judges observation that,

> [the employer's] contention that all its property is a work area is a contention that can be asserted by every company, thus effectively destroying the right of employees to distribute literature. Some work tasks, whether it be cleaning up, maintenance, or other incidental work, are performed at some time in almost every area of every company.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Ron Isomura, conducted handbilling on July 9, 1997, at its porte-cochere entrance, and/or that the Respondent invoked Nevada trespass law against these employees, and, within 3 days thereafter, notify each employee, in writing, that this has been done and that it will not use either fact against them in the future.

(b) Inform the Las Vegas city attorney in writing that it wants to withdraw the trespass citations it caused to be issued against these employees on July 9, 1997.

(c) Reimburse these employees for any legal or other expenses which any of them may have incurred while defending themselves against the trespass citations prior to the point when the Respondent shall have notified the Las Vegas city attorney of its desire to withdraw the citations.

(d) Post at its Las Vegas hotel/casino facility copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees (including employees of lessees occupying its premises) are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent (or by lessees occupying its premises) at any time on or after July 9, 1997.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[16] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."